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the taking issue and environmental regulation

the connecticut coastal area management program

THE "TAKING ISSUE" AND THE CONNECTICUT COURTS:
A CONSTITUTIONAL LIMITATION ON
THE USE OF THE POLICE POWER

Prepared for the
STATE OF CONNECTICUT
DEPARTMENT OF ENVIRONMENTAL PROTECTION
COASTAL AREA MANAGEMENT PROGRAM

by
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P R E F A C E

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The report discusses from a case law perspective how Connecticut courts have have treated the issue of taking without compensation when regulations reduce the usability of land. It also gives guidelines for the drafting of environmental legislation related to land use.

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S U M M A R Y

The primary constitutional limitation on the state's ability to use the police power in land use management is the requirement that compensation be paid to landowners whose property is taken for public use. A "taking" may occur in two situations involving land use. The most obvious form of taking occurs when a landowner's property is condemned by the state under the power of eminent domain, and the land is used for the construction of highways, schools, and the like. In addition to cases of condemnation, the Connecticut courts have also considered takings to have occurred when a governmental regulation so restricts a landowner's use of his property that there is, for all practical purposes, a taking of the property for public use. If the statute or ordinance under which the regulation is exercised does not provide for the payment of compensation, it may be held invalid as to the landowner, or may be struck down in part or in its entirety.

The Connecticut courts have interpreted these constitutional requirements rather conservatively, and have not hesitated to find takings in a variety of circumstances. The test used by a court in determining whether a taking has occurred is ordinarily a "balancing analysis," in which the burden placed on the landowner by the regulation is balanced against the benefit derived from the regulation by the public. If the landowner is left with little or no opportunity to realize a financial gain from his property, the

taking is termed a "practical confiscation". Short of regulation which results in a "practical confiscation," the factors employed in a "balancing analysis" include the diminution in value of the property caused by the regulation, the nature and degree of the public benefit derived from the regulation, and the alternatives available to the landowner. If a regulation results in a "practical confiscation", the statute or ordinance will be held invalid, no matter how laudable the public benefit. In other situations, the statute or ordinance will be upheld if the burden on the landowner is outweighed by the benefit to the public.

The final section of this report consists of guidelines which should be followed in the drafting of legislation to minimize potential problems with the taking issue. Recent cases before the Connecticut courts suggest that the courts are becoming increasingly aware of the importance of environmental legislation, which may be of critical importance in future litigation involving the taking issue.

BACKGROUND AND OVERVIEW

Both the United States and Connecticut constitutions require that the state shall not take private property for public use¹ without "just compensation". These constitutional guarantees were first introduced into Anglo-American law in the Magna Carta, and were based on a fear of the expropriation of private property by the sovereign.² Through judicial interpretation, they have become the major constitutional limitations on the state's ability to use the police power in the management of land use growth and development.

The constitutional guarantees requiring "just compensation" for the public taking of private property are applied to problems involving land use in two different situations. The first, and most obvious, form of taking occurs when privately owned land is condemned by the state under the power of eminent domain, and the land is used for the construction of highways, public buildings, or for any other valid public purpose. In such a case, the state gains actual and exclusive possession of the land; because private property has

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U.S. Const. amend V provides:

"... nor shall private property be taken for public use, without just compensation".

Conn. Const. art. 1, sec. ii provides:

"The property of no person shall be taken for public use without just compensation therefore".

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Bosselman, et al., The Taking Issue, p. 56 (1973).

been "taken", the state must compensate the owner. In cases of condemnation, the major issue in litigation is ordinarily not whether a taking has occurred, but whether the owner has received³ "just compensation" for the taking.

A second form of taking may occur when the state attempts to regulate the use of private property through an exercise of the police power. While government ordinarily need not compensate an owner for losses caused by the regulation of private property, situations occur where state or local regulation so limits or destroys the owner's benefits in the use of his property that there has been, for all practical purposes, a taking of the property for public use. In such a situation, the statute or ordinance under which the regulation is exercised may be held invalid as to the property owner, or may be struck down in part or in its entirety.

Because of differences in time, philosophies, and factual situations, it is difficult to determine precisely how a particular court will define the interface between valid regulation under the police power and taking requiring compensation. However, as the case law has developed, the Connecticut courts have developed standards and factors employed in this process of determining when a taking has occurred. The purpose of this chapter is to investi-

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See, e.g., Bowen v. Ives, 37 Conn. L.J. No. 52 (1976) .

gate the standards and factors employed in this process, and to develop guidelines for the drafting of land use legislation so as to minimize potential problems with the taking issue.

STANDARDS AND FACTORS APPLIED BY THE COURTS

The state's police power can be imposed if the purported regulation bears a reasonable relation to the subjects which fall fairly within the police power, and if the means employed are within constitutional bounds.⁴ The means used will fall outside the constitutional bounds when they are destructive, confiscatory, or so unreasonable as to be arbitrary.⁵

The concept of what governmental regulation is confiscatory (e.g. results in a taking) was much more restricted in the past than it is today. Cases such as Pumpelly v. Green Bay Co., 80 U.S. 166 (1871), where the construction of a dam authorized by the state caused the flooding of the plaintiff's land, established the "physical invasion" theory of confiscation, which required compensation to be paid to landowners whose property was physically invaded and permanently destroyed or rendered valueless by state action. But Mugler v. Kansas, 123 U.S. 623 (1887), where a statute prohibiting the manufacture and sale of intoxicating liquors caused the plaintiff's brewery to become virtually worthless, held that compensation was not required as long as the statute was reasonably related to the police power.⁶

⁴ State v. Hillman, 110 Conn. 92, 100, 147 A. 294 (1929)

⁵ Id.

⁶ 123 U.S. 623 at 661.

Thus, the early interpretation of the taking clause provided that, as long as the statute or ordinance had a reasonable relation to the police power, compensation for the effects of regulation on the use of land would not be required unless there was a physical invasion of the land, or an actual expropriation of it.

These standards were altered after the decision in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). The case involved a Pennsylvania statute which, through the police power, prohibited the mining of coal under certain types of developed land. When an injunction issued under the statute was upheld by the Pennsylvania Supreme Court, the Coal Company appealed to the United States Supreme Court on the ground that the statute's enforcement resulted in an unconstitutional taking of their property without compensation.

The U.S. Supreme Court sustained the appeal, and struck down the statute. Writing the majority opinion, Justice Oliver Wendell Holmes recognized the right of the state to limit private land use under the police power, but also noted that there are limitations on the use of this power:

One fact for consideration in determining such limits is the extent of diminution of value. When it reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends on the particular facts.

He stated the general rule as follows:

While property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking.⁸

Thus, the decision in Pennsylvania Coal broadened the interpretation of the term "taking". The decision added the possibility that compensation would be required if a statute or ordinance regulated private property "too far", even if there were no expropriation or physical invasion of the land. Because the point where permissible regulation ends and confiscation requiring compensation begins was, in Holmes' analysis, a matter of degree, each case would have to be decided "on the particular facts", thereby permitting a large amount of judicial discretion in each decision. Further, because the U.S. Supreme Court largely refused to consider other cases involving the taking issue, the state courts were left to formulate their own standards within the framework established by Holmes. The result of these factors was a large variance of opinion among the individual states regarding limitations on the use of the police power as applied to land use.

The standards which have evolved in the Connecticut case law to determine these limitations were recently stated by the Connecticut Supreme Court in Brecciaroli v. Commissioner of

⁸260 U.S. 393 at 415.

Environmental Protection, 36 Conn. L.J. No. 42, p.4:

Short of regulation which finally restricts the use of property for any reasonable purpose resulting in a "practical confiscation", the determination of whether a taking has occurred must be made on the facts of each case, with consideration being given not only to the degree of diminution in the value of the land, but also to the nature and degree of public harm to be prevented, and alternatives available to the landowner.⁹

This approach recognizes a "continuum" of possible takings, from a "practical confiscation" which is, by definition, a taking, to factual situations which, while not practical confiscations, will undergo a balancing analysis to determine whether the private burden is outweighed by the public benefit. "Practical confiscations" and the balancing process are discussed in the following subsections.

Practical Confiscation

The Connecticut courts have considered a practical confiscation to have occurred when a statute or ordinance purporting to regulate through the police power finally deprives a landowner of any reasonable use of his land. As in all findings of a taking, if the statute or ordinance does not provide for compensation, it will either be held invalid as to the landowner, or will be struck down in part or in its entirety.

A taking which was a practical confiscation was the subject of Del Buono v. Board of Zoning Appeals of the Town of Stratford, 143 Conn. 673, 124 A. 2d 915 (1956). The plaintiff sought a change in the zoning classification of his five-acre tract of land from residential B to business 1. He was refused the change by the planning and zoning board, but was granted

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36 Conn. L.J. No. 42 at 5,6.

a two year waiver of the residential zoning classification by the defendant. Unsatisfied, the plaintiff appealed to the Court of Common Pleas, which sustained the appeal.

The Connecticut Supreme Court affirmed. The court noted that extensive drainage, filling, and piling would be necessary to make the land suitable for residential building "at excessive cost" and that all the surrounding land had been zoned either commercial or industrial, with "dilapidated shanties" providing part of the neighborhood. The court found that the property, under the residential zoning classification, "for all practical ends . . . had been stripped¹⁰ of every use to which it might reasonably be put". Because the defendant's action constituted a taking, the court ruled that it¹¹ had acted illegally and arbitrarily.

Another case often cited as an example of a practical confiscation is Dooley v. Town Planning and Zoning Commission of the Town of Fairfield, 151 Conn. 304, 197 A. 2d 770 (1964). In Dooley, the defendant had amended the Fairfield zoning regulations by creating a new zone entitled "flood plain district". The plaintiff's land was reclassified from residential B to the new zone, which limited the use of the land so classified to parks, playgrounds, marinas, clubhouses, boathouses, landings and docks, wildlife sanctuaries operated by governmental units or non-profit organizations, farming, and motor vehicle parking. He appealed the reclassification to the

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143 Conn. 673 at 677; 124 A. 2d 915 at 917.

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143 Conn. 673 at 679; 124 A. 2d 915 at 918.

Court of Common Pleas, which dismissed the appeal.

The Connecticut Supreme Court found that the plaintiffs land was not suited for marine use because it was located a half mile from Long Island Sound, and noted that farming had long since been ruled out in the area.¹² The other potential uses were so limited that the property had been depreciated in value by at least 75 percent.¹³ While the court found merit in the zoning regulation's intent, the result of the reclassification was that it "froze the area into a practically unusable state", and that enforcement of the regulations amounted, "in effect, to a practical confiscation of the land".¹⁴ Thus, the regulations could have no application as to the plaintiff's property.

A similar situation to that in Dooley occurred in Bartlett v. Zoning Commission of the Town of Old Lyme, 161 Conn. 24, 282 A. 2d 907 (1971). The town adopted new zoning regulations for tidal wetlands which restricted the use of the plaintiff's land to use for wooden walkways, wharves, duck blinds, public boat landings and public ditches; on the granting of a special exception, boathouses, piers, docks, and jetties were permitted. While noting the laudable nature of the ordinance, on plaintiff's appeal the Connecticut Supreme Court stated that "the plaintiff's use of his property is practically non-existent unless he happens to own a boat".¹⁵ Thus, the ordinance as it affected the plaintiff, was an unconstitutional taking of his property

¹² 151 Conn. 304 at 309, 310; 197 A. 2d 770 at 773.

¹³ Id.

¹⁴ 151 Conn. 304 at 311; 197 A. 2d at 770 at 773.

¹⁵ 161 Conn. 24 at 31; 282 a. 2d at 910.

without just compensation, and was held invalid to him.¹⁶

Dooley and Bartlett clearly demonstrate that "reasonable use" has been defined by the Connecticut courts in purely financial terms. While there were real alternative uses available in both cases, the appeals by the plaintiffs were sustained because the potential uses allowed for little or no financial gain to the landowner.

Besides leaving no reasonable use of the land for its owner, a practical confiscation must result in a final deprivation of all reasonable use. In Samp Mortar Lake Co. v. Town Planning and Zoning Commission of the Town of Fairfield, 155 Conn. 310, 231 A. 2d 649 (1967), the plaintiff claimed that a change in the zoning of his property, upon which he operated a truck terminal, from industrial to residence A, would constitute a taking of his property without just compensation. However, the plaintiff had been operating his truck terminal before the zoning change, and because he could continue to operate it as a non-conforming use, the court held that there had been no taking.¹⁷

Similarly, in Vartelas v. Water Resources Commission, 146 Conn. 650, 153 A. 2d 822 (1959), the defendant had, under authority of a state statute, established an encroachment line along a riverbank on land owned by the plaintiff's decedent. Building within the encroachment line was permitted only with the permission of the defendant. When the plaintiff applied for a permit to construct a concrete foundation building within the encroachment line, the permit was denied on the ground that the

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Id.

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155 Conn. 310 at 315; 231 A. 2d 649 at 651.

foundation would impair the capacity of the channel during flooding. The plaintiff's claim of a taking was rejected by the Connecticut Supreme Court on the ground that the plaintiff could always seek permission to build a different type of structure, "for example, one on piers or cantilevers", which would meet the requirements of the defendant.¹⁸ The court stated that, "until it appears that the plaintiff has been finally deprived . . . of the reasonable and proper use of the property, it cannot be said that there has been an unconstitutional taking without just compensation."¹⁹

Finally, in Brecciaroli v. Connecticut Commissioner of Environmental Protection, 36 Conn. L.J. No. 42, p. 4., the plaintiff was denied a permit to fill 5.3 acres of tidal wetland, a regulated activity under the Tidal Wetlands Act. On the Plaintiff's claim that the denial constituted a taking without compensation, the Connecticut Supreme Court affirmed the trial court's finding that no taking had occurred.²⁰ The Supreme Court held that no practical confiscation had occurred because the plaintiff could still apply for a permit for filling a lesser portion of his wetland or for any other regulated use, or he could make any other unregulated use of the property as he wished.²¹ However, the court did not state what these alternative uses might be.

In summary, a practical confiscation will occur when the landowner is left, after state regulation, with little or no opportunity to realize a financial gain from his land. The Connecti-

¹⁸ 164 Conn. 650 at 656; 153 A. 2d at 825.

¹⁹ 146 Conn. 650 at 658; 153 A. 2d at 826.

²⁰ 36 Conn. L.J. No. 42 at 6.

²¹ Id.

cut courts have applied these standards rather conservatively, and regulations have been held invalid as to the landowner even when the court has recognized the laudable nature of the regulation. No plaintiffs appear to have challenged the general constitutionality of a state regulation on a claim of practical confiscation in such terms as would necessitate a court to strike down an entire regulation; rather, plaintiffs have seemed to be content to merely have the regulation held inapplicable to their situation.

It is interesting to note that claims of takings based on practical confiscation were denied in both Vartelas and Breciaroli because the plaintiff had the opportunity to amend his application and re-apply for a permit. In both cases, the potential for re-application served to defeat the claim because there had been no finality of deprivation of use provided. Thus, from this standpoint, a permitting procedure, allowing a discretionary role for an agency or a decision-maker, may be a superior method of sidestepping a potential practical confiscation than a listing of permitted uses which proved disastrous in Dooley and Bartlett. At the same time, such a discretionary role opens up possibilities for "negotiation" between the local administrator and the developer.

Balancing of Public and Private Interests

Even though there has been no practical confiscation, a Connecticut court may find that a taking has occurred, or will

occur, if a heavy burden place on a landowner's property by governmental regulation is not outweighed by the benefit to the public. As noted earlier, the factors to be considered in a balancing analysis include the nature and degree of the public benefit, the alternatives available to the landowner, and the diminution in value of the property caused by the regulation.

Nature and Degree of the Public Benefit, Alternatives Available to the Owner.

In Chevron Oil Co. v. Zoning Board of Appeals of the Town of Shelton, 37 Conn. L.J. No. 31 p. 3 (1976), the plaintiffs had signed a lease of commercially zoned property in a predominantly residential neighborhood. The plaintiff's land, 25,000 feet square, was bounded by another piece of property which was zoned residentially, but which could not be used for residential purposes because of its irregular shape. The plaintiff applied for a variance in the setback regulation from forty to twenty feet, which was refused by the defendant. The practical effect of this refusal was that 85% of the property could not be used as a gasoline service station, as was the plaintiff's intent. The plaintiff claimed that the setback regulation, as applied to the property, was confiscatory, and the trial court agreed.

The Connecticut Supreme Court affirmed the finding that a taking had indeed occurred.²² The court noted that there had been no practical confiscation of the plaintiff's property, since a portion of the land could be used for some permitted use if the variance were not granted.

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37 Conn. L.J. No. 31 at 5.

It did not, however, state what these uses might be.

The court noted that the irregularly-shaped, residentially-zoned property lying adjacent to the plaintiff's land would serve as a buffer between the plaintiff's land and the community, and that the granting of the variance would not adversely affect the use and value of the neighboring land. When these considerations were balanced against the deprivation to the plaintiff, the court held that the application of the setback requirement to the plaintiff's land would be "equivalent to confiscation", and affirmed the granting of the variance.²³

While the Supreme Court acknowledged in Chevron Oil that a balancing analysis should consider, as stated in Brecciaroli, "not only the diminution in the value of the land, but also . . . the nature and degree of public harm to be prevented and the alternatives available to the landowner", it is clear that the minor nature of the degree of public harm actually prevented by the application of the ordinance was the controlling factor.

The low degree of the public benefit was also the controlling factor in Corthouts v. Town of Newington, 140 Conn. 284, 99 A. 2d 112 (1953). The plaintiffs had purchased land zoned industrial 2, which permitted residential use. The defendants later amended the zoning regulations to prohibit all residential uses in industrial 2 land with the exception of those for janitors and caretakers. The plaintiffs claimed, in their suit for declaratory judgement, that the amendment was confiscatory, and the trial

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Id.

court, in agreeing, rendered the entire amendment unconstitutional and void.

The Connecticut Supreme Court treated the suit somewhat differently. Rather than affirming the trial court, the Supreme Court held for the plaintiffs, but ruled the amendment void only²⁴ as it affected the plaintiffs. It noted that there was a demand for residential land in the town, while there had been almost no demand for industrial land for twenty years. Because the amendment specifically prohibited residential use, but permitted community buildings, churches, hotels, clubhouses, schools, playgrounds, and business generally, the court was unable to discover any "facts to indicate that the amendment would serve²⁵ the public health, safety, and welfare in any way".

A later case was Horwitz v. Town of Waterford, 151 Conn. 320 197 A. 2d 636 (1964), where a local zoning ordinance required a lot to abut an accepted street before a building permit could be issued for construction on the lot. A road did pass by the plaintiffs' lot, but it did not meet the definition of an accepted street. When the plaintiffs' application for a building permit was denied, they appealed to the Court of Common Pleas, which held that the ordinance was confiscatory as applied to the plaintiffs' land.

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140 Conn. 284 at 290; 99 A.2d 112 at 115 .

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140 Conn. 284 at 289; 99 A.2d 112 at 115 .

The Connecticut Supreme Court affirmed.²⁶ It recognized the defendant's claim that there was no adequate means or access for fire protection to the property, but also noted that there were already several other buildings on the land. The court held that "safety would not be appreciably affected by the addition of another house. The application of the ordinance to the plaintiffs' land would seem to be so harsh in comparison with the trivial public benefit, if any, which might result from its enforcement, that the ordinance is confiscatory when applied to the plaintiffs' land".²⁷ The court also observed the alternatives available to the landowner, who owned no other land in the vicinity, or no other land between the parcel involved and an accepted street.²⁸

Thus, in Chevron Oil, Corthouts, and Horwitz, when a private detriment was balanced against a non-existent or low-degree public benefit, the courts refused to sustain the government action. However, when the public benefit from a statute or ordinance is of a higher magnitude than the potential public benefits were in Chevron Oil, Corthouts and Horwitz, the case law indicates that the courts will ordinarily deny a taking claim by a plaintiff.

Thus, in Aunt Hack Ridge Estates v. Planning and Zoning

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151 Conn. 320 at 325; 197 A. 2d 636 at 638.

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151 Conn. 320 at 324; 197 A. 2d 636 at 638.

²⁸ Id.

Commission of the City of Danbury, 160 Conn. 109, 273 A. 2d

880 (1970), the plaintiff, a developer, claimed that local regulations authorized by state statute requiring at least 10,000 square feet of park and playground in his planned subdivision served as an unconstitutional taking of his land without compensation. However, the Connecticut Supreme Court held that the public welfare was²⁹ paramount to the plaintiff's claim, and upheld the ordinance.

The court noted the need for public open space, stating, "in the times of burgeoning populations, critical housing problems and the incentive which they create for the activity of land developers, the need for parks, recreational areas and open space³⁰ for the welfare of people looms large". This factor overshadowed any detriment suffered by the developer's inability to use the open space for additional housing.

In Figarsky v. Historic District Commission of the City of Norwich, 37 Conn. L.J. No. 51, p. 10 (1976), the plaintiffs were ordered by a building inspector to make certain repairs on a building owned by them which dated from colonial times. Rather than make the repairs, which they claimed would cost between \$15,000 and \$18,000, the plaintiffs sought permission to have the building demolished. Because the building was located on the edge

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160 Conn. 109 at 120; 273 A. 2d 880 at 886.

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37 Conn. L.J. No. 51 at 15.

of the Norwich historic district, a certificate of appropriateness was required from the defendant Commission, established under state statute. The defendant refused and the plaintiffs appealed on the ground that the refusal amounted to a taking without compensation.

Both the trial court and the Connecticut Supreme Court³¹ affirmed the defendant's action. While it was acknowledged that the building was of little historical value in itself, the court noted that it did serve as a buffer between the historic district and the rest of the town, and that the benefits derived from the historic district were within the meaning of the general welfare.³² It should be noted that the plaintiff's case in Figarsky was hampered by failure to introduce evidence concerning the value of the property with and without the building.³³

The propensity of the Connecticut courts to uphold legislation which results in a high degree of public benefit in a balancing analysis is particularly evident in situations where the regulated activity approaches that of a public nuisance. In State v. Hillman, 110 Conn. 92, A. 294 (1929), a local zoning ordinance prohibited the building of non-conforming uses, when more than fifty percent of the assessed value of the building was designed for "noxious" trade in any light industrial or residential zone. When the plaintiff's barrel factory, a non-conforming use which

³¹ 37 Conn. L.J. No. 51 at 15.

³² Id. at 11.

³³ Id. at 15.

caused the emission of noxious, pungent and obnoxious odors . . . and black smoke" was more than 75 percent destroyed, the city refused the plaintiff a permit to reconstruct the buildings, and ordered the remaining buildings closed. The Connecticut Supreme court held the regulations valid as a reasonable exercise³⁴ of the police power.

Similarly, in State v. Heller, 123 Conn. 492, 196 A. 337 (1937), the defendant was convicted of bathing in a stream on his land tributary to a reservoir, a violation of state statute. Even though the court noted that the statute served to totally divest the defendant of his property right to bathe in his stream, it held no taking had occurred.³⁵ The court noted the³⁶ nuisance-like nature of the defendant's conduct, and found the statute valid as an exercise of the police power.

Finally, in Farmington River Co. v. Town Planning and Zoning Commission of the Town of Farmington, 25 Conn. Supp. 125, 197 A. 2d 653 (1963), the plaintiff challenged the validity of a local ordinance issued under C.G.S. sec. 7-148 (1960) which regulated the removal of earth so as not to create "dust, odor, smoke, fumes, noise or vibration sufficient to constitute a nuisance". The regulation provided for a permit procedure and regrading and resurfacing

³⁴ 110 Conn. 92 at 107; 147 A. 294 at 300.

³⁵ 123 Conn. 492 at 503; 196 A. 337 at 342.

³⁶ Id.

requirements which, the plaintiff claimed, "were so onerous as to result in a taking without due process of law". On the plaintiffs' suit for declaratory judgement, the court held that the regulations were reasonably related to the police power,³⁷ and that their application to the plaintiff would not be "onerous or harsh"³⁸ so as to constitute a taking.

Diminution in Value of the Landowner's Property

Besides the alternatives available to the landowner and the nature and degree of the public benefit, the diminution in value of a landowner's property caused by governmental regulation may play an important part in a balancing analysis. While a landowner is not necessarily entitled to the maximum financial gain from the use of his land under police power regulation, the Connecticut case law indicates that there are limitations in the amount by which private property can be diminished in value, and when those limitations have been reached, the governmental action becomes confiscatory. A study of the Connecticut cases demonstrates that the diminution in value must be quite substantial to support a taking claim successfully.

In an early taking case, Strain v. Mims, 123 Conn. 275, 193 A. 754 (1937), the plaintiffs were the owners of a store located on

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25 Conn. Supp. 125 at 138; 197 A. 2d 653 at 660.

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25 Conn. Supp. 125 at 136; 197 A. 2d 653 at 659.

land zoned No. 1 business. The land was rezoned residential, which made their store a nonconforming use and precluded the plaintiffs from adding gasoline pumps to the store. In a suit for declaratory judgement and injunction, and the Connecticut Supreme Court held that the zoning change was unreasonable and³⁹ and invalid. While the plaintiffs were not prevented from using their property for any reasonable purpose, when the private burden was balanced against the public benefit, the private burden emerged paramount. The court stated that "the outstanding and controlling factor is that the value of the plaintiff's property will be diminished about 70 percent without, so far as it appears,⁴⁰ in any way promoting the public welfare".

In Dooley v. Town Planning and Zoning Commission of the Town of Fairfield, supra, evidence showed that the change in the zoning of the plaintiff's land from residential to flood plain resulted in a diminution in value of at least 75 percent of the value of⁴¹ the land, under the permitted uses, leading to a "practical confiscation" of the land. Similarly, in Bartlett v. Zoning Commission of the Town of Old Lyme, evidence showed that the fair market value of the plaintiffs land after being rezoned to wetlands

³⁹ 129 Conn. 275 at 288; 193 A. 754 at 760.

⁴⁰ Id.

⁴¹ 151 Conn. 304 at 309; 197 A. 2d 770 at 773.

from commercial usage decreased from \$32,000 to \$1,000.⁴²

However, the precise amount of weight given the evidence concerning diminution of value in Dooley and Bartlett is complicated by the fact that, in both cases, the court seemed to base their decisions more on the fact that there was no reasonable use of the land left to the owner rather than on diminution of value alone.

Apart from cases involving rezoning, diminution of value may be an important factor in zoning variance applications as well. In an application for a variance, the variance may sometimes be granted in a situation where the application of the zoning ordinance practically destroys the value of the property, with so little relationship to the purposes of zoning that the effect is arbitrary and confiscatory.⁴³ In Culinary Institute of America v. Zoning Board of Appeals of the City of New Haven, 143 Conn. 257, 121 A. 2d 637 (1956), where the plaintiff appealed the defendant's decision to grant a variance permitting the construction of an apartment house in a residential neighborhood zoned for single family homes, the court upheld the decision of the board based on the board's finding that the property had little or no value as a single family residence. The court felt that to compel such use would be confiscatory, and that the granting of the variance would improve both the appearance and property values in the

⁴² 161 Conn. 24 at 29; 282 A. 2d 907 at 910.

⁴³ Picirillo v. Board of Zoning Appeals, 139 Conn. 116, 121, 90 A. 2d 647, 649 (1952).

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neighborhood. Similarly, in Libby v. Board of Zoning Appeals of the City of New Haven, 143 Conn. 46, 188 A. 2d 894 (1955), the Connecticut Supreme Court upheld the granting of a variance by the defendant allowing the conversion of a one-family house to a two-family home based on the finding that there was "no present market value" for a single family house in the neighborhood,⁴⁵ and that there would be no harm to the public.

Because diminution of value is evidentiary of the potential use of land and the burden on the landowner, a failure to present such potentially critical evidence has often hindered a plaintiff's claim that a governmental action is confiscatory. This failure is particularly damaging in light of the fact that Connecticut follows the majority rule, that the burden of proving that an ordinance or statute is unreasonable or confiscatory is on the plaintiff landowner.

For example, in Figarsky v. Historic District Commission of the City of Norwich, supra, the plaintiff, to support his contention that a failure to grant his requested certificate of appropriateness to demolish a building would be burdensome and confiscatory, presented evidence concerning the cost of repairs ordered by the building inspector. However, the plaintiff failed to introduce evidence concerning the value of the property without the repairs,⁴⁶ or with the repairs. Because of this omission, the court could

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143 Conn. 257 at 262; 121 A. 2d 637 at 640 .

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143 Conn. 46 at 53; 118 A. 2d 894 at 897.

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37 Conn. L.J. No. 51 at 15.

not determine the relative impact of the building inspector's order on the plaintiff's property, which would be the major consideration should the certificate of appropriateness be denied. Similarly, in State v. Hillman, where the plaintiff claimed that a zoning regulation empowering the City of Bridgeport to order the removal of his non-conforming use was confiscatory, the court noted that the failure of the plaintiff to introduce evidence regarding the diminution of the value of the property seemed to imply the conclusion that the effect on the landowner was "small in extent".⁴⁷

Summary

In summary, the difference between a taking termed a practical confiscation and a taking requiring a balancing analysis is one of degree. In a practical confiscation, it is claimed that the property owner has been finally deprived of all reasonable use of his land. A balancing analysis is employed when it is claimed that the uses available to the landowner under the regulation are not justified by the degree of public benefit gotten from the regulation. The difference between the two claims is clearly one of degree, but there is an important difference in the standards applied under each claim. Under a balancing analysis, the public benefit may outweigh the burden placed on the owner, and defeat the claim that a taking has occurred. The public benefit is not a factor in determining whether a practical confiscation has

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110 Conn. 92 at 107; 147 A. 294 at 300.

occurred, for no matter how laudable the public benefit, a regulation which results in a final deprivation of all reasonable use of an owner's property will be considered a taking.

The benefit to the public is measured in both nature and degree in a balancing analysis. The nature of the public benefit may include, but is not limited to, such factors as public health, safety, the demand and availability of land, nuisance abatement, and effects on local property values. The degree to which the regulation actually gives benefit to the public will always be critical in a balancing analysis. If little or no benefit is derived from the regulation, a challenge to it from a heavily burdened property owner will be successful. But the Connecticut case law indicates that a challenge, even from a heavily burdened owner, will generally be denied when a real benefit to the public is shown.

Besides the nature and degree of the public benefit, diminution of value is also an important factor in a balancing analysis. Value is defined in the Connecticut courts by "market value" or "fair market value"; thus, landowners have successfully claimed their inability to attract buyers under an existing zoning regulation as evidence that the land and the buildings thereon were rendered valueless by state or local regulation. While some diminution of value by regulation is permissible, when the degree of diminution is greater (e.g. 70 percent in Strain, 75 percent in Dooley, 98 percent in Bartlett, near 100 percent in Culinary Institute and

Libby), a court may declare that the limits on permissible regulation have been reached, and uphold the challenge to the regulation.

Finally, the alternatives available to the landowner may also be considered in a balancing analysis. Included in this category are the burdens, besides diminution of value, which are placed on the private party through the application of the regulation, such as the inability of the plaintiff to use the property for his desired purpose (as in Strain, Chevron, and Bartlett).

GUIDELINES FOR THE DRAFTING OF ENVIRONMENTAL LEGISLATION
RELATED TO LAND USE

Potential problems with judicial interpretations of the taking clauses can be minimized with drafting techniques that recognize the standards that a court will apply when the validity of a statute is questioned. Based on the standards and factors discussed in the previous section, the following rules should aid in upholding the validity of a statute challenged as confiscatory.

Type of Statute

A statute or ordinance which regulates land use may be either self-enforcing, or it may establish an administrative agency for permitting or licensing and enforcement. A self-enforcing statute generally lists permitted uses or prohibited activities directly in the statute; no agency is created to administer the legislation. If an agency is created to administer the legislation, the agency will ordinarily administer the statute through a permitting or licensing procedure.

Statutes employing a permitting agency are preferred over self-enforcing statutes that list permitted uses. The former are less susceptible to a constitutional challenge which may invalidate the statute, for two reasons. First, a plaintiff who alleges a confiscation in the denial of a permit may be defeated because the possibility of re-application may preclude a finding of final deprivation

of all reasonable use of the landowner's property. This was the controlling factor in the Vartelas and Brecciaroli decisions, supra. Second, if a court does find that a taking has occurred, it may remand to the agency for action not inconsistent with the court's decision (see below, "Clauses Prescribing Remand to the Agency"). There would be no such flexibility under a self-enforcing statute which lists permitted uses.

Clauses Prescribing Remand to the Agency

If the environmental legislation establishes an administrative agency for permitting or licensing, a clause requiring a court to remand its order to the agency upon a determination that a taking has occurred will provide maximum flexibility for the agency's response. (See Conn. Gen. Stat. sec. 22a-43a (Rev. to 1975)). With such a clause, it is insured that the agency will have the choice of either purchasing the land (see below, "Compensation Clauses"), holding the legislation invalid as to the property owner, or amending its original decision.

Permitted Uses

If the statute is to be self-enforcing (i.e. no administrative agency will be delegated or created to enforce it) or if permitted uses of land are to be listed, some uses should be of a nature that will allow the landowner to realize some financial gain from the land. The draftsman must carefully consider whether the permitted

uses under the statute will conform to this requirement. The Old Lyme tidal wetlands ordinance, held invalid as to the plaintiff in Bartlett, and the Fairfield flood plain zoning regulation, similarly held invalid in Dooley, illustrate the consequences of the failure of the draftsman to anticipate this standard.

In Bartlett and Dooley, the following permitted uses were held insufficient under the requirement that permitted uses must allow the landowner to realize some financial gain from the land:

- a. wooden walkways, wharves, duckblinds, public boat landings
ditches operated by the town, parks, playgrounds, and non-profit wildlife sanctuaries;
- b. under special exception - digging and dredging of the channel to sufficient width and depth to accommodate the applicant's boat; placing of a boathouse on pilings to accommodate the applicant's boat; erection of piers, docks and piles for life lines, rafts, or jetties.

The draftsman must do more than simply list permitted uses which allow a potential financial gain from the land. Even if a permitted use allows a sufficient financial gain, it will be of little help to a landowner whose property cannot be employed for the permitted use. This factor was illustrated in Dooley, where the permitted uses for flood plain districts included farming, boathouses, landings and docks. Because farming had long been ruled out for the area, and because the plaintiff's land was located a half-mile from Long Island Sound, these permitted uses were impractical for

the particular land in question. Thus, the draftsman must list permitted uses with an eye towards what may be practical in the particular areas where the statute or ordinance is to be applied.

Given the requirement that a landowner must be able to realize some financial gain from his land under the permitted uses of a statute or ordinance, the draftsman will naturally be interested in listing those which both meet this requirement and do minimal damage to the environment. While not all the following "non-harmful" uses have been validated by the Connecticut courts, they are illustrative of the types of permitted uses which may be sufficient.

- a. farming, truck and nursery gardening;
- b. marinas, boathouses, and landings for rental;
- c. motor vehicle parking;
- d. signs and billboards;
- e. easements through the land for public utilities;⁴⁸
- f. entrance fees for tourist access to walkways built over wetlands;⁴⁹ and
- g. annual payments to the wildlife areas from local school districts for field trips.⁵⁰

The above list is not intended to be complete, but is meant to stir consideration of other "non-harmful" uses by the draftsman.

⁴⁸Bosselman, et. al., The Taking Issue at 294, 295.

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Id.

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Id.

Declaration of Policy

A statute or ordinance should include a strong declaration of policy, stating the relation of the environmental legislation to the public health, safety, and general welfare. Such a declaration of policy can be used by a court in determining whether the legislation is reasonably related to the police power. More importantly, it is of aid in gauging the nature and degree of public benefit, which is a central factor in a balancing of the public and private interests involved, and hence, in determining the validity of the statute. The declaration of policy included in the Tidal Wetlands Act was extensively cited in Brecciaroli v. Commissioner of Environmental Protection, supra, where a denial of a permit under the Act was affirmed by the Connecticut Supreme Court.

Compensation Clauses

The environmental legislation should include a clause which allows for the payment of compensation should a court determine that a taking has occurred. This allows the state or municipality to purchase land which it deems critical for environmental purposes, and may serve to uphold the validity of the statute if it is challenged in its entirety from the claim that it fails to provide "just compensation".

Savings Clauses

Statutes and ordinances should include clauses which provide that, should a court find a section of the statute or ordinance invalid, the decision will not impair the vailidity of the remaining section, thereby leaving the remaining sections intact.

While careful drafting can minimize the chance that a court will find an application of the statute confiscatory, ultimately the decision will rest on the philosophy of the court. The Language of the recent Rykar⁵¹ and Brecciaroli cases may signal a growing awareness among the Connecticut courts of the importance of environmental regulation. Because of the subjective nature of the standards applied to a taking claim, this development may be the most important factor in the future of Connecticut legislation under the "taking issue."

⁵¹ Rykar Industrial Corp. v. Gill, Connecticut Superior Court, Hartford County, File No. 170229 (1973).

